EXHIBIT "E"

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, WESTERN DISTRICT

JEWELL KISSINGER ET UX.,
PLAINTIFFS

vs. NO. CIV 89-69

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

On this 1st day of October, 1990, comes on to be heard the motion of defendant, Arkansas State Highway Commission, to dismiss the complaint filed herein against it and the response thereto of plaintiffs, Jewell Kissinger and Gladys Kissinger; upon consideration whereof, and after hearing argument of counsel, the Court is of the Opinion that this action by plaintiffs constitutes a suit against the State of Arkansas and that the Court lacks jurisdiction to hear same.

IT IS THEREFORE CONSIDERED AND ORDERED that the motion of defendant should be, and is hereby, granted, and that this cause must be, and is hereby dismissed without prejudice.

/s/ Gerald Pearson
Circuit Judge
10/16/90

Precedent Prepared By:
/s/ Philip N. Gowen
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JEWELL KISSINGER AND GLADYS KISSINGER
PLAINTIFFS

vs. NO. J-C-93-378

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

Presently before the Court is Defendant's Motion to Dismiss (Doc. #7). In 1987 and 1988, the Defendant's a portion of Plaintiff's property was damaged due to work performed by the Defendant on its adjacent land. Plaintiffs assert that their property was taken by the Defendant without due process of law in violation of the 14th amendment of the U.S. Constitution and Article II, §22 of the Arkansas Constitution as it was done over Plaintiffs objections.

The initial complaint was filed in the Circuit Court of Craighead County, Western District, Arkansas on February 14, 1988, asserting that the Defendant failed to compensate Plaintiff for its condemnation of their property and subsequently violated their constitutional rights. The Circuit Court of Craighead County held that a suit against the Arkansas State Highway Commission is a suit against the State of Arkansas and thus dismissed the case for lack of jurisdiction.

Pursuant to A.C.A. §19-10-101 et seq., Plaintiffs filed a complaint with the Arkansas State Claims Commission. A.C.A. §19-10-204 (a) provides as follows:

> [e]xcept as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

The Arkansas State Claims Commission held that Plaintiffs' "right-of-way" claims were invalid but awarded $13,000.00 for driveway and other damages. Plaintiff contends that the Arkansas State Claims Commission failed to rule on the constitutional issue contained in their Complaint and thus this Court is the appropriate forum for consideration of the issue.

Defendant's Motion to Dismiss is based upon the following arguments: (1) the suit is against the Arkansas Highway Commission which is an agency of the State of Arkansas, thus, the suit is barred by the 11th Amendment to the Constitution of the United States; (2) the Arkansas State Claims Commission and the General Assembly have exclusive jurisdiction over monetary claims against the State of Arkansas pursuant to Article 5, §20 of the Constitution of Arkansas, A.C.A. §19-10-101 et seq.; and Section 6 of Act 462 of the Acts of Arkansas of 1949; (3) there is an adequate state remedy; (4) the Complaint fails to state a claim upon which relief can be granted; (5) the Complaint fails to state grounds upon which jurisdiction is asserted; (6) due to the award by the Arkansas State Claims Commission these procedures are barred by application of the doctrines of Res Judicata, Collateral Estoppel, Waiver, Laches and Statue of Limitations; and (7) the Plaintiff has failed to exhaust all available state remedies.

Although the named Defendant in the suit is the Arkansas State Highway Commission, service was made upon the individual members of the Commission. A suit against the Arkansas State Highway Commission or its individual members in there capacity as commissioners is a suit against the State of Arkansas. *Edelman v. Jordan,* 415 U.S. 651 (1974); *Light v. Blackwell,* 472 F.Supp. 333 (E.D.Ark. 1979). Thus it is barred by the Eleventh Amendment to the United States Constitution. Although this finding is dispositive of the suit, the Court will address the Plaintiff's due process arguments.

This is an inverse condemnation action as it is brought to recover damages resulting from work performed on land owned by the Defendant and adjacent to Plaintiff's land. "[A]n inverse condemnation action . . . is not permitted in Arkansas in view of the remedies available in the chancery courts in way of injunctive relief and in the State Claims Commission for monetary damages." *Id.* at 337. Thus, this action is distinct from one in which an individuals property is taken by eminent domain and the owner is given the opportunity to argue before a jury as to the value of the land. The fact that the state

converted Plaintiffs' property prior to a deprivation hearing does not violate Plaintiffs' due process rights.

> [I]t has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.

Bailey v. Anderson, 326 U.S. 203, 205 (1945) (citations omitted).

"[P]ost deprivation notice and hearing are sufficient to satisfy the requirements of constitutional due process ...". *Harris v. Missouri Conservation Com'n.,* 790 F.2d 676, 678 (8th Cir. 1986).

The Plaintiffs were not deprived of due process as equitable relief through the chancery court was available to the Plaintiff prior to the property conversion and compensation through the State Claims Commission was available after the conversion. *Light* at 336 The Plaintiffs received a post deprivation hearing before the Arkansas State Claims Commission on April 21, 1992 thus their constitutional due process right was not violated. Defendant's Motion to Dismiss is granted.

It is SO ORDERED this 19th day of August, 1994.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 8-23-94 by MKF.

1995 Legislature

STATE CLAIMS COMMISSION DOCKET

Amount of Claim $50,00.00 Claim No. 91-399C-CC

Jewell Kissinger & Gladys Kissinger Claimant

vs.

AR State Highway Department Respondent State of Arkansas

Date Filed October 18,1991

Attorneys

Keith Blackman, Attorney Claimant
Mark Whitmore, Claims Attorney Respondent

Type of Claim Unlawful taking of property and Attorney Fees (+)

FINDING OF FACTS

The Claimants, Jewell and Gladys Kissinger, represented by Mr. Keith Blackman, Attorney-at-Law, and the Respondent, Arkansas State Highway Department, represented by Mr. Mark Whitmore, Staff Attorney, were present at a hearing on April 21, 1992.

At the 1992 hearing the Claims Commission directed the parties to discuss the cost of a new driveway onto Claimant's property. The Claimants were directed to obtain at least three estimates on the cost of a driveway and provide the estimates to the Respondent. Also at the 1992 hearing the Claims Commission unanimously held the "right-of-way" issue involved in the claim to be invalid and denied that part of the claim.

After receiving driveway and other damage estimates from the Claimants and comment from the Respondent the Claims Commission does now unanimously find Respondent liable for damage to Claimant's property in the amount of $ 13,000.00. Therefore, the Claims Commission unanimously awards this claim in the amount of $ 13,000.00, and **will present this claim to the 80th General Assembly, 1995 Legislature, for subsequent approval and payment.**

The Claims Commission strongly recommends that in the future

the Arkansas State Highway Department notify all adjacent landowners, by mail, before proposed construction begins of the name and address of any project contractor(s) and how to proceed with claims against said contractor(s) for any alleged damage they cause to the owner's property.

IT IS SO ORDERED.

CONCLUSION

The Claims Commission unanimously approves this claim in the amount of $ 13,000.00, and hereby directs the Claims Commission Clerk **to submit a Special Claims Bills covering payment to the 80th General Assembly, 1993 Legislature, for subsequent approval and payment.**

Date of Hearing April 21, 1992

Date of Disposition August 10, 1993

/s/ Diane Pieroni
Chairman

/s/ Ron Owens
Commissioner

/s/Robert Handley
Commissioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-3237

Jewell Kissinger; Gladys Kissinger, Appellants,

v.

Arkansas State Highway Commission, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[UNPUBLISHED]

Submitted: February 21, 1995
Filed: February 28, 1995

Before FAGG, MAGILL, and BEAM, Circuit Judges.

PER CURIAM.

Jewell and Gladys Kissinger appeal the district court's[1] dismissal of their 42 U.S.C. 5 1983 damages action against the Arkansas State Highway Commission (the Highway Commission). We affirm.

The Kissingers alleged that part of their land was wrongfully taken by the Highway Commission when it exercised a right-of-way it held. The Kissingers alleged this act violated their rights under the Fourteenth Amendment and the Arkansas Constitution because the Highway Commission failed to provide them sufficient compensation or due process. The district court dismissed the action, concluding it

[1]The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

was a suit against the State of Arkansas, and as such, was barred by the Eleventh Amendment.

Absent consent or Congressional abrogation, "a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Williams v. Missouri*, 973 F.2d 599, 599-600 (8th Cir. 1992) (per curiam) (Eleventh Amendment immunity bars suit absent two exceptions, Congressional abrogation or state waiver). "[A] state agency which is the sole creation of the state has no separate identity, and thus cannot be stripped of it's [sic] official character." *Glick v. Henderson*, 855 F.2d 536, 540 (8th Cir. 1988) (Eleventh Amendment barred injunction against Arkansas Board of Corrections). The Highway Commission is a state agency created by the Arkansas Constitution and charged solely with the administrative control of the Arkansas Highway and Transportation Department. *See* Ark. Const. Amend. 42 § 1 (Michie 1987) (creation and powers); Ark. Code Ann. § 27-65-102 (Michie 1994) (control of highway department); Ark. Code Ann. § 27-65-107 (Michie 1994) (powers and duties). Thus, the district court correctly concluded the Kissingers' action is a suit against the State of Arkansas.

Because the Kissingers have not shown that either of the exceptions to the Eleventh Amendment are applicable, their suit is barred. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (state's waiver of immunity must be "express" waiver); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 66 (1989) (state is not a "person" within meaning of section 1983; section 1983 did not abrogate states' Eleventh Amendment immunity).

The dismissal is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.